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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 628

H. MARK SOLOMON, Administrator d. b. n. c. t. a. of the Estate of Caroline L. Pleibel, Deceased,
Petitioner,

vs.

MARY H. S. BEATTY, Also Known as Mrs. George Myers and Also as Mrs. George H. S. Myers

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF

Barnet Lieberman,
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SUPREME COURT OF THE UNITED STATES

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No. 628

H. MARK SOLOMON, ADMINISTRATOR d. b. n. c. t. a. OF THE ESTATE OF CAROLINE L. PLEIBEL, DECEASED,

Petitioner,

vs.

MARY H. S. BEATTY, ALSO KNOWN AS MRS. GEORGE MYERS AND ALSO AS MRS. GEORGE H. S. MYERS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

H. Mark Solomon, Administrator d. b. n. c. t. a. of the Estate of Caroline L. Pleibel, deceased, hereby petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida, rendered December 18, 1953.

I. Summary Statement of the Matter Involved

This is an action brought by a civil complaint in the Circuit Court for Sumter County, State of Florida, to recover upon a certain order entered by the Orphans' Court of Philadelphia County, Commonwealth of Pennsylvania, against the respondent, in a proceeding entitled "In Re: Estate of Caroline L. Pleibel, Dec'd.," which order reads as follows:—

"And now, October 3, 1951 upon consideration of the annexed petition, it is Ordered and Decreed that Mary H. S. Beatty, now known as Mrs. George Myers, former Executrix of the Will of Caroline L. Pleibel, deceased, pay to H. Mark Solomon, Administrator D. B. N. C. T. A., within 10 days after personal service of this order upon her or service by registered mail to her last place of residence, the sum of $18,413.90 with interest from November 8, 1933, being the amount which said Mary H. S. Beatty, now known as Mrs. George Myers, was surcharged by the adjudication of this court per Henderson, J. dated November 8, 1933."

The respondent filed an Answer and a Motion to dismiss the Complaint upon the ground that the Complaint failed to state a claim upon which relief could be granted. Subsequently, the petitioner moved for the entry of a summary judgment in his favor because the Answer failed to present a defense to the matter set up in the Complaint. When the motions came on for hearing the trial court ruled in favor of the respondent's motion and dismissed the action and stated that, therefore, there was no necessity to consider petitioner's motion for Summary Judgment.

The petitioner took an appeal to the Supreme Court of Florida which affirmed the judgment of the Circuit Court for Sumter County dismissing the petitioner's action.

The principal and only question involved on said appeal was whether the order of the Orphans' Court of Philadelphia County, Pennsylvania, set forth above, was such a judgment or decree of the Commonwealth of Pennsylvania which would require the State of Florida to give it full faith and credit under Article 4 Section 1, of the United States Constitution in an action brought on said judgment or decree in the State of Florida.

The Supreme Court of Florida decided said question in the negative.

II. Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code.

Said judgment of the Supreme Court of Florida is a final judgment.

The Supreme Court of Florida is the highest court of the State in which a decision in this case could be had.

The petitioner's right, privilege and action in this case were specially set up and claimed under Article 4 Section 1, of the United States Constitution.

The federal question here involved was raised in the Court of first instance when respondent filed an Answer to petitioner's Complaint commencing the action and a motion to dismiss the Complaint and the petitioner moved for the entry of a summary judgment in his favor because the Answer failed to present a legal defense.

Upon petitioner's appeal to the Supreme Court of Florida, the federal question here involved was the only question raised.

III. Question Presented

Is the order and decree of the Orphans' Court of Philadelphia County, Pennsylvania such a "Judicial Proceeding" of the Commonwealth of Pennsylvania that requires

the State of Florida to give it "Full Faith and Credit" under Article 4 Section 1 of the United States Constitution?

IV—Reasons For Allowance of Writ

1. The petitioner's rights under Article 4, Section 1 of the United States Constitution were violated when the Supreme Court of Florida refused to give full faith and credit to the Order and Decree of the Orphans' Court of Philadelphia County, Pennsylvania hereinbefore set forth because in the opinion of the Supreme Court of Florida said Order and Decree was not a "final judgment."

Titus v. *Wallick*, 306 U.S. 282;
Barber v. *Barber*, 323 U.S. 77.

2. The precise question of whether the above Order and Decree is a public act, record or judicial proceeding covered by Article 4, Section 1 of the United States Constitution has never been determined by this Court or any other federal court. It appears that this is the first time the validity or effect of such an Order or Decree has been challenged by any other state court. The Orphans' Courts in the 67 counties of Pennsylvania normally make a great many orders and decrees similar in nature to the one here involved. Therefore, we believe a review of the Florida Supreme Court's decision in this matter is of importance in the administration of decedent's estates under Pennsylvania law.

3. The decision of the Supreme Court of Florida is in conflict with the decision of this Court in the case of *Michigan Trust Co.* v. *Ferry*, 228 U.S. 346.

In the *Michigan Trust Co.* case the Probate Court of Ottawa, Michigan, had removed the defendant, while he was out of the State, as executor under a decedent's will and appointed the plaintiff as administrator d. b. n. c. t. a. In

the decree the Probate Court, inter alia, "ordered, adjudged and decreed" that, within sixty days from date, the defendant, "do pay the sum of $915,355.08 to the (plaintiff), together with interest on said sum from this date until paid at the rate of 5% per annum." The plaintiff brought suit on this order and decree in the Circuit Court for the District of Utah. The defendant demurred to the complaint, the Circuit Court sustained the demurrers and gave judgment to the defendant, and this judgment was affirmed by the Circuit Court of Appeals.

In reversing the Circuit Court of Appeals, Mr. Justice Holmes declared:—

> "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. It applies to Article IV, Section 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause. Nations *v.* Johnson, 24 How. 195, 203, 204. This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the Probate Court." "* * * it is no less well established in many (States)

that an executor must account for all the property that has come to his hands, and the proceedings end with a decree that he pay over the sum with which he is chargeable either to his successor or the ultimate distributees, such a decree indeed being a condition precedent of the cumulative remedy on the bond. Storer *v.* Storer, 6 Massachusetts, 390, 392, 393. Cobb *v.* Kempton, 154 Massachusetts, 266, 269. Murray *v.* Wood 144 Massachusetts, 195, 197. Probate Court *v.* Chapin, 31 Vermont, 373, 376. In Beall *v.* New Mexico, 16 Wall. 535, 540, it is recognized that some States have made it the duty of an administrator who has been displaced to account to the administrator de bonis non, and very many decisions to that effect are cited correctly in 2 Woerner, Adm., 2nd ed., Section 352, p. 748. Vide id., Section 536, pp. 1181, 1182.

As there can be no doubt of the power of the States to give the larger scope to an account, which indeed is not illogical in view of the fuller modern development of the notion that an executor holds all the assets in a fiduciary capacity, the only question in any case is what the State has seen fit to do.

Upon this question courts of other jurisdictions owe great deference to what the court concerned has done. It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the Supreme Court of the State is produced, the probability is that the local procedure follows the traditions of the place. Therefore we should feel bound to assume that the Michigan decree was not too broad, in the absence of statute or decision showing that it was wrong.

But unless and until the Supreme Court of Michigan shall decide otherwise we are of opinion that the probate Court was right."

4. The law of the Commonwealth of Pennsylvania supporting the Order and Decree here involved is as follows:—

The Orphans' Court of each county, whether separate or not, is a court of record with all the qualities and incidents

of a court of record at common law. Its proceedings and decrees in all matters within its jurisdiction cannot be reversed or avoided collaterally in any other court, but they may be reversed, modified or altered on appeal. Each Orphans' Court has a seal engraved with the same device as is on the great seal of the Commonwealth and with the name of the court.

Orphans' Court Act of 1951, Section 204
20 Purdons Statutes, Section 2080.204

Any judge of an Orphans' Court, learned in the law, whether or not the court is separate and whether or not it consists of more than one judge, may hear and determine all matters of which the court has jurisdiction. His determination thereof is a final decree, unless exceptions thereto are authorized by rule of court or the decree discloses that it is not intended as such.

Orphans' Court Act of 1951, Section 401
20 Purdons Statutes, Section 2080.401

Except where otherwise provided by a rule adopted by the Supreme Court of Pennsylvania or by an Act of Assembly of Pennsylvania, the pleading and practice conforms to the pleading and practice in equity in the local Court of Common Pleas.

Pennsylvania Supreme Court
Orphans' Court Rules:—Section 3, Rule 1

The Orphans' Courts of the several counties of the Commonwealth of Pennsylvania may adopt local rules regulating practice and procedure, but such rules cannot be inconsistent with any rule adopted by the Supreme Court of Pennsylvania or any Act of Assembly of Pennsylvania regulating the practice and procedure in the Orphans' Courts of Pennsylvania.

Pennsylvania Supreme Court
Orphans' Court Rules:—Section 1, Rule 1.

Under the laws of Pennsylvania, an Executor is required to file an account of his administration at the expiration of six months from the grant of Letters Testamentary, or when directed to do so by the Court.

The Fiduciaries Act of 1949
20 Purdons Statutes, Section 320.701.

When an executor files an account with the Orphans' Court he submits himself to the jurisdiction of that Court and he cannot afterwards repudiate that jurisdiction, *Engles Est.*, 180 Pa. 215. Also see *Moore* v. *Fields*, 42 Pa. 467 and *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346.

The account is examined and audited by the Orphans' Court.

The Fiduciaries Act of 1949
20 Purdons Statutes, Section 320.711

The examination and audit of the account in open court and objections to the account must be made at the audit in such manner as the auditing judge may direct.

Pennsylvania Supreme Court;
Orphans' Court Rules:—Section 6, Rule 10;
Philadelphia Orphans' Court;
Local Rule No. 6 (M).

Written notice of the filing of the account and the call thereof for audit or confirmation must be given to every unpaid creditor who has given written notice of his claim and to every other person of whom the accountant has notice or knowledge who claims an interest in the Estate.

Pennsylvania Supreme Court;
Orphans' Court Rules:—Section 6, Rule 3.

The Clerk of the Orphans' Court of Philadelphia County is required to give notice of the hearing of the Estates listed for audit by advertising once a week for three weeks

in The Legal Intelligencer and once a week for two weeks in two daily papers.

Philadelphia Orphans' Court;
Local Rule No. 6(F).

When the account is called for audit, written appearances of all counsel in the case who are actually in Court with the names of their clients and the nature of their interests or claims must be presented to the auditing judge.

Philadelphia Orphans' Court;
Local Rule No. 6(G).

After completion of the hearing, the auditing judge determines all the matters involved by filing a written "Adjudication" which is confirmed absolutely as of course unless written exceptions thereto are filed within fifteen days from the date of filing of the "Adjudication."

Philadelphia Orphans' Court;
Local Rule No. 7(A).

The findings of fact in this "Adjudication" have the same effect as a verdict of a jury.

Houston's Estate, 318 Pa. 300.

Where the auditing judge disallows credits claimed by the executor, he may surcharge him for such disallowed credits.

Lennig's Estate, 53 Pa. Superior 596.

Such surcharges become a personal obligation of the Executor, *Irvine's Estate,* 203 Pa. 602; *Strong's Estate,* 160 Pa. 13.

All applications to enforce an adjudication for the payment of money by a fiduciary *must* be by petition of the person entitled to the same, briefly setting forth the facts upon which such application is based. If the same is satis-

factory to the Court, a peremptory "order to pay" will be granted, a certified copy of which must be served personally on the respondent at least 10 days prior to the day named in the order.

Philadelphia Orphans' Court;
Local Rule No. 23(B).

There can be no appeal or collateral attack on an "Order to Pay".

Yeisley's Estate, 358 Pa. 200;
Boning's Estate, 217 Pa. 306;
Jennings Estate, 38 Pa. Superior 522, 524;
Gross Estate, 36 Pa. Superior 54.

Although there seems to be no Pennsylvania Supreme Court case which specifically calls an "Order to Pay" a "final judgment", the following Pennsylvania lower court cases do so hold.

Blum's Estate, 38 District & County Reports 588;
Baker's Estate, 48 District & County Reports 163.

Compliance with an order or decree of the orphans' court may be enforced by:

(1) attachment of the person;
(2) sequestration of real or personal property;
(3) execution on personal property;
(4) attachment execution; or
(5) execution on real estate.

Orphans' Court Act of 1951, Section 751;
20 Purdons Statutes, Section 2080.751.

The portions of the statutes cited above are the same as were in force at the time the proceedings against the respondent were being pursued in the Orphans' Court of Philadelphia, Pennsylvania.

5. The quotation from the case of *Jenning's Estate,* 38

Pa. Superior 552, 554, upon which the Supreme Court of Florida bases its conclusion that the Pennsylvania "order to pay" was not a "final judgment", was made by the Pennsylvania Superior Court in connection with the question of *the right to appeal from an "order to pay"* and does not determine the appellant's rights under Article 4, Section 1 of the United States Constitution. The latter protects the "Public Acts, Records and *Judicial Proceedings*" (italicized by us) of every other State.

A judgment, decree or *other order* of a Court is valid if, (a) it is rendered by an impartial tribunal after a reasonable notice and an opportunity to be heard has been given to all persons to be bound thereby; (b) the State in which it is rendered has jurisdiction to act judicially with respect to the person or subject matter affected; (c) no limitation upon the exercise of judicial jurisdiction by the State has been exceeded; (d) the Court is competent by the law of its State to exercise judicial jurisdiction. This rule applies to judgments of all Courts, including courts of equity (whether called order, injunction *or* decree), judgments of probate courts, admiralty courts and special courts of all kinds.

Restatement, Conflict of Laws, Section 429.

A valid foreign judgment as defined above which imposes a duty to pay money will be enforced by an action if (a) it is final; (b) it is certain in amount; (c) it is unconditional; (d) it has not been vacated; (e) execution has not been superseded in the State which rendered it.

Restatement, Conflict of Law, Section 434;
Dunn v. *Hild,* 125 Pa. Superior 380, 384.

The order and decree of the Orphans' Court of Philadelphia, Pennsylvania, meets all of the above standards.

V. Record of Florida Opinion

The opinion of the Supreme Court of Florida in this case is reported in 68 So. (2d) 881.

VI. Transcript of Record

The petitioner presents to this Court and files herewith a duly certified transcript of the entire record in the case, as the same appears in the Supreme Court of Florida.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of Florida to the end that the errors aforesaid may be corrected by this Court.

BARNET LIEBERMAN,
Counsel for Petitioner.

(3770)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953 No. 628

H. MARK SOLOMON, Administrator d.b.n.c.t.a. of the Estate of Caroline L. Pleibel, Deceased, *Petitioner*,

v.

MARY H. S. BEATTY, also known as Mrs. George Myers and also as Mrs. George H. S. Myers.

On Petition for a Writ of Certiorari to the Supreme Court of Florida.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Circuit Court for the Fifth Judicial Circuit of Florida, in and for Sumter County, Florida, appears at pages 40 and 41 of the record.

The opinion of the Supreme Court of Florida, filed December 18, 1953, is reported in 68 So. (2d) 881 (Record pages 51, 52 and 53).

Jurisdiction

Jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code on the ground that the Supreme Court of Florida determined that the Decree of the Orphans' Court of Philadelphia County, Commonwealth of Pennsylvania, dated October 3, 1951, was not a final judgment under Pennsylvania law but on the contrary was an auxiliary mandate, and therefore it did not serve as a basis for a suit in Florida, under the full faith and credit clause of the Federal Constitution.

Question Presented

Whether a decree of an Orphans' Court of the Commonwealth of Pennsylvania, ordering the payment of a sum of money, which form of decree has been construed by the Supreme Court of Pennsylvania to be not properly a final decree but merely an order to pay the sums which had formerly been decreed, and a warrant that the duty under the decrees entered on former accounts be performed, is a final judgment under Pennsylvania law to which a sister state must give full faith and credit?

Statement of the Case

For a proper understanding of the nature of the decree sought to be enforced and the denomination of it by the Supreme Court of Florida as an "auxiliary mandate" a brief statement of fact is requisite.

1. The Respondent and her husband were granted Letters Testamentary as Executors of the Estate of Caroline L. Pleibel, Deceased, by the Register of Wills of Philadelphia County on July 25, 1929 (R. 2).

2. On November 25, 1931, the husband of Respondent, John Eckstein Beatty died, and Respondent continued as surviving Executrix (R. 2).

3. On or about April 4, 1933, as evidenced by the Entry of Appearance, the Account of the Executrix came before the Orphans' Court of Philadelphia County for audit (R.18).

4. On November 8, 1933, the Account was confirmed NISI by the auditing judge by an adjudication wherein he surcharged John Eckstein Beatty as one of the executors with four payments on account of principal and interest made to him during the lifetime of testatrix as agent for testatrix which he had not remitted to testatrix in her lifetime, improper payments made to one Elberson Little made in testatrix's lifetime and the commission which Beatty as a coexecutor would otherwise have been entitled to, and thereafter directed the surviving executrix (Respondent herein), when the assets of the estate had been realized, to submit a supplemental statement, a petition for distribution and thereafter a schedule of distribution to be annexed to and form part of the adjudication (R. 31).

5. At the time of the aforesaid adjudication it was not possible to determine whether the estate was solvent (R. 31). On January 12, 1934 it appeared that the estate was not solvent (R. 23). The record does not disclose that any assets came into the hands of the Respondent, nor does the complaint filed by the Petitioner herein so aver (R. 1-2).

6. The record does not show, nor is any averment made, that at any time, the Respondent in accordance with the adjudication of November 8, 1933 (1) realized upon the assets of the estate, (2) submitted a supplemental statement, (3) a petition for distribution, (4) and/or a schedule of distribution.

7. On or about October 3, 1951, approximately eighteen years after the aforesaid adjudication, Judge Hunter, of the Orphans' Court of Philadelphia County, signed a Decree, at the unopposed request of Petitioner, which is the basis of this action and is set forth on Page 2 of the Petition.

8. Upon Respondent's motion that the complaint based on the said Decree be dismissed for failure to state a claim upon which relief could be granted, the trial court ruled in Respondent's favor and dismissed the action. The Supreme Court of Florida affirmed the judgment of the trial court (R. 51-53).

Argument

The Supreme Court of Florida, in its consideration of the question before it, requested respective counsel to furnish written answers to three questions. The answers to these questions provide a concise summary of the argument on behalf of the Respondent as follows:

Summary of Argument

1. The nature of the Order of the Orphans' Court of Philadelphia County, Pennsylvania, entered October 3, 1951, under the law of Pennsylvania, is that it is a method of enforcing a prior final decree or adjudication for the payment of money.

2. The Order of October 3, 1951, is not a final judgment under the Statutes and decisions of the State of Pennsylvania but is a method under local procedure of enforcing a final order or judgment.

3. The order of October 3, 1951, under the practice and procedure of the Courts of the State of Pennsylvania is a normal preliminary to the issuance by the Court of a writ of attachment of the person followed by a hearing on the question of contempt if the order is not obeyed. It is not such an order or judgment as is satisfied by execution against personal property.

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1. The nature of the Order of the Orphans' Court of Philadelphia County, Pennsylvania, entered October 3, 1951, under the laws of Pennsylvania, is that it is a method of enforcing a prior final decree or adjudication for the payment of money.

The Order of October 3, 1951 was entered by the Orphans' Court under Local Rule 23(B), paraphrased in the Petition at the bottom of page 9 and the top of page 10. Consideration of the Rule in full discloses clearly its nature. The Rule is captioned "Satisfaction and Enforcement of Decrees", and provides as follows:

> (b) "All applications to enforce a decree or adjudication for the payment of money or costs, or for the delivery of any goods, chattels, or other assets of an estate, by a fiduciary or surety shall be by petition of the person or persons entitled to the same, briefly setting forth the facts upon which such application is based. If the same be satisfactory to the court, a peremptory order to pay or transfer, assign or deliver, as the case may be, will be granted, a certified copy of which must be served personally upon the respondent at least 10 days prior to the day named in the order. An attachment will be awarded upon petition setting forth the necessary facts, if the respondent fails to comply with the order of the court on or before the date so named, and proof is furnished that service of the order has been made."

The plain language is that the order to pay is a method of enforcing a *decree* or *adjudication* for the payment of money. The matter is ably discussed in the outstanding authority in Pennsylvania on the subject of Orphans' Court practices. Pennsylvania Orphans' Court Practice, Remick Fourth Editon, Volume 1, page 521, 522:

> "Sec. 174. Enforcement of Payment by Fiduciaries—If the award by the court is not forthcoming from the executor or administrator to the distributee,

or is improvidently made, two remedies are open,—first, by attachment as for contempt of court, or by procedure in the common pleas.

"The former is usually preceded by a petition for an order to pay. To such petition there can be no effective answer except as to matters which have arisen subsequently to the award.

"If this fails to produce the desired result, or if no adequate answer be filed, an attachment will issue in the usual form followed, if necessary, by committment for contempt."

It will be observed from a reading of the foregoing that the Order being presently considered is not a final decree or a judgment, as described by Petitioner at page 5, 10 and 11 of his Petition.

The Pennsylvania Supreme Court as recently as 1948 cited with approval, in *Yeisley Estate*, 358 Pa. 200, 56 A. (2d) 205, the analysis made in *Jenning's Estate*, 38 Pa. Superior Ct. 522, 524, as to the nature of this type of order to pay:

"The order appealed from here is not properly the subject of an appeal, for it is not properly a final decree but merely an order to pay the sums which had formerly been decreed against this appellant. It merely warrants him to perform his duty under the decrees entered on his former accounts. It was only the decrees, and not this order, that could be appealed from."

It is from this type of an order to pay, and order of enforcement that no appeal lies.

It is this nature of the order, the fact that it is not, under the laws of Pennsylvania, a final judgment, that renders the decision of the Supreme Court of Florida consistent with the decision of this Court in the case of *Michigan Trust Co. v. Ferry*, 228 U. S. 346, cited at length on pages 5 and 6 of the Petition. Therein, it is clear, this Court determined that the Michigan decree was a final judgment whereby the proceedings were ended under the statutes and decisions of the State.

The adjective "peremptory" employed before the word "order" in Rule 23(b), thus it has been seen, succinctly describes the nature of the order and clearly indicates it must necessarily follow, upon application, if a final decree directing payment has theretofore been entered.

The next usual step after obtaining an order to pay such as is now being considered, is, as Remick (supra) indicates, to have the person refusing to pay attached, and if the refusal persists, then the latter is committed for contempt of court. By such a method usually the court is successful in obtaining compliance with the original decree.

The alternative method of enforcement mentioned by Remick (section 174, supra), to wit, by a procedure in the Common Pleas Courts, was, the Record demonstrates (R. 31, 32, 33) also attempted in this matter. The procedure is set out at length in section 175 of Remick, pages 523-525 as follows :

> "The alternative method is by procedure in the common pleas. As to this, the act provides rules for filing and docketing, in the common pleas 'certified transcripts or extracts from the record showing the amount appearing to be due from, or in the hands of any fiduciary, on the settlement of his accounts in the

orphans' court of the same or any other county, or by virtue of a decree of said court, which transcripts or extracts, so filed, shall constitute judgments, which shall be liens against the real estate of such fiduciary from the time of such entry until payment, distribution, or satisfaction' with further provisions as to the lien of such judgment revival thereof, etc.

"Such certificate must be filed in the lifetime of the executor and it is a waiver of exceptions to the account. When filed in the common pleas, it is not a judgment payable as such out of a decedent's estate; it is payable only as a lien on lands or as a simple contract debt.

In relief of the fiduciary the act further provides for the satisfaction of such judgment upon proof of payment.

If no answer is filed by the respondent named in the petition, a form of decree should be submitted to the court and a certified copy thereof filed with the prothonotary."

The Court's attention is particularly invited to the words: "When filed in the common pleas, it is not a judgment payable as such out of the decedent's estate;". Just as the order to pay, it is a local method of enforcement of a valid judgment.

The Circuit Court for the Fifth Judicial Circuit of Florida, in and for Sumter County, dismissed the action based on the exemplified record of the Court of Common Pleas of Philadelphia County for failure of the complaint to show judgment rendered by any Court of the Commonwealth of Pennsylvania (R. 40). The dismissal would ap-

pear to be in conformity with the decisions of the Supreme Court of Pennsylvania, for the reason that the record clearly reflected that at no time in the proceedings had the Orphans' Court of Philadelphia County ever made a final adjudication that the Respondent should pay a sum of money to anyone. The Court, by the adjudication of Judge Henderson, dated November 8, 1933, had ordered Respondent, as surviving executrix, to convert assets and when assets of the estate had been realized, file a schedule of distribution (R. 31). The Pennsylvania Supreme Court has defined the practice in such instances as follows:

> "A question of practice has been submitted about which the profession is apparently in some doubt. Whether a decree of the orphans' court dismissing exceptions to and confirming its adjudication absolutely or the schedule of distribution subsequently aproved is the definitive decree from which appeal lies. Our conclusion is that an appeal lies from the completed decree after the filing of the schedule of distribution, that is to say, the appeal should not be taken until the schedule of distribution is filed: Graham's Est. 294 Pa. 493, 494, 144 Atl. 427; Levy's Est. 307 Pa. 522, 161 Atl. 740; Maron's Est. 317 Pa. 476, 177 Atl. 768. In those cases where no schedule of distribution is required, the appeal, of course, should be taken from the decree dismissing exceptions and confirming the adjudication." *Hood's Estate* 232 Pa. 253, 260, 261 (1936) 186 A 740.

In accordance with this practice, had Judge Henderson ordered the Respondent to pay a sum of money, and had not, as he did, direct her to convert assets, to file a supple-

mental statement listing surcharges against Beatty, and to file a Schedule of Distribution, the adjudication would have been a final order, if unappealed, would have been entitled to full faith and credit.

2.

The Order of October 3, 1951, is not a final judgment under the Statutes and decisions of the State of Pennsylvania but is a method under local procedure of enforcing a final order or judgment.

From the authorities discussed in the foregoing section and Local Rule 23(B) it is clear that the Order of October 3, 1951, is not a judgment, nor a final judgment but is a method under local procedure of enforcing a final order or judgment.

The cases set forth by Petitioner on page 10 of his Petition support this statement completely.

In *Blum's Estate*, 38 District and County 588 (Pa.) (page 10 of Petition) the opening words of the Court are as follows:

> "In the audit of the first and final account of the administrator d.b.n.c.t.a. of the estate of Edward H. Blum, deceased, we awarded in our adjudication filed October 9, 1938, to Urgie McConnell, a claimant for servant's wages, the sum of $288.39, which award, no exceptions having been filed thereto, became a final decree of this court on October 19, 1939."

It will be observed that a definite sum certain is awarded unconditionally to a named individual. The question before the Court was whether the Commonwealth of

Pennsylvania could be thereafter substituted as a claimant for Urgie McConnell, on the basis she was indebted to the Commonwealth for public support previously given her, and have the award marked to the use of the Commonwealth. There was no question in the case as to an order to pay under Local Rule 23(B).

Similarly in *Baker's Estate*, 48 District and County 163 (Pa.) (Petition, page 10). The case involved an audit of a trustee's account. About ten years prior thereto an action was instituted, by the cestuis que trustents named in deeds of inter vivos trusts, against the estate of the deceased trustee, seeking to recover moneys lost and dissipated. The court appointed an auditor. The auditor absolved the decedent's estate from liability, but recommended that the substituted trustees pay the expenses of the proceedings. The Order, a part of the final decree in the proceedings provides as follows:

> "And now May 20, 1935, it is ordered and decreed that Edith L. C. Allen and Rachel L. C. Baker and the Montgomery Trust Company, substituted trustees for Edith L. C. Allen and Rachel L. C. Baker, pay the expenses of the proceedings, as set forth in the report of the auditor."

At the audit of the substituted trustee's account, a claim was made for the expenses awarded ten years earlier. The Court stated there could be no question as to the validity of the claim since the order of the Orphans' Court had never been complied with. Here again there was no

question before the court as to an enforcement order such as is now being considered.

3.

The order of October 3, 1951, under the practice and procedure of the Courts of the State of Pennsylvania is a normal preliminary to the issuance by the Court of a writ of attachment of the person followed by a hearing on the question of contempt if the order is not obeyed. It is not such an order or judgment as is satisfied by execution against personal property.

Had the Respondent been physically within the Commonwealth of Pennsylvania, on and after October 3, 1951, and refused to respond to the enforcement order to pay, the Petitioner normally would petition the court for a writ of attachment. If Respondent thereafter was physically brought into court in response to the writ, the court would conduct a hearing to determine whether she was in contempt of the court order of October 3, 1951.

While it does not appear in the printed record it was brought to the attention of the Supreme Court of Florida by the brief of Respondent's Counsel that the records of the Orphans' Court of Philadelphia County in this matter disclose that on May 26, 1950, John J. Cahill, Esq., Master, appointed such by the Orphans' Court of Philadelphia upon petition of Petitioner, herein, filed his account, captioned as follows: "Account filed by John J. Cahill, Master, Stating the Account for Mary H. S. Beatty, now known

as Mary H. S. Myers, former Surviving Executrix". The Account confirmed that none of the assets of the estate of Caroline L. Pleibel, Deceased, were now in the possession of, and were never possessed or retained by Mrs. Myers but had been liquidated by the banks which held the assets as security for loans to the decedent. The Account further revealed that nothing had been realized on the surcharges. Undoubtedly this would have urged in the defense of any contempt proceedings which might have been instituted.

If, on the other hand, Respondent did pay any sums to the Petitioner, he, as the Administrator d.b.n.c.t.a., would thereafter file his account in the Orphans' Court, and give notice to all parties in interest, including Respondent, as a person entitled, under the adjudication of Judge Henderson, to commissions and as a legatee.

Conclusion

The proceeding instituted by Petitioner in the State of Florida attempted to have that sovereign state compel a person, who is not now nor ever has been possessed of assets liable for claims against the Estate of Caroline L. Pleibel, who has never been ordered to pay over such assets in a definite amount to any person, to pay out of her personal funds a sum of money surcharged against a third person (Beatty) to the Petitioner who had obtained in the Orphans' Court of Philadelphia County, by his own action, the appointment of a Master who fully reported as to all assets of the estate and shown that none exist, by according to the decree of a sister state qualities

which it did not by its nature, as defined by the Supreme Court of Pennsylvania, possess. This the Supreme Court of Florida refused to do and correctly concluded that the order was not a final judgment under Pennsylvania law but merely an auxiliary mandate directing a step in the proceedings subsequent to the adjudication proper.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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J. WILLISON SMITH, JR.,
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